No. 2545.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

William L. Sassaman, Claimant of the Gasoline Launch "Calypso," her Boats, Tackle, Apparel, Furniture and Cargo,
Appellee.

REPLY BRIEF OF WILLIAM L. SASSAMAN, APPELLEE.

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STATEMENT.

This action is in admiralty, as stated by counsel for the United States, to forfeit the gasoline launch "Calypso." A decree was obtained in the District Court at San Francisco forfeiting the one-sixth interest of Morris Pettenger in the vessel and ordering the same sold "free of any encumbrance or lien" and further ordering "that the interest of William L. Sassaman be not condemned." It is against this portion of the decree freeing the five-sixths interest of Sassaman that the government appeals. In other words, the gov-

ernment adopts and executes the decree as to Pettenger and appeals as against Sassaman.

The boat was seized in Monterey Bay while engaged in smuggling Chinese into the United States. The United States attorney in his opening statement says:

"The boat was manned and controlled at the time of seizure by Morris Pettenger, a part owner in the boat, as well as a partner in its operation.

The illegality of the acts of the boat are undisputed. Likewise it is uncontroverted that the said Pettenger actually was the master of the boat at the time of seizure.

It is also undisputed that he was the enrolled master of the boat."

The above statement, perhaps unintentionally, assumes the main questions in dispute, viz.: That at the time of the seizure Pettenger was a partner in the operation of the boat, and was actually its master. Said matters are decidedly disputed by appellee. The real question is as to who was master of the Calypso at time of seizure within the meaning of the Chinese Exclusion Act. Under the evidence Pettenger was not and could not be master within the meaning of said act, unless Sassaman had knowledge of the smuggling trip.

Counsel for the United States correctly says that the issue raised by the claimant is that the acts of Pettenger were unauthorized and fraudulent as to Sassaman and that Pettenger could not in law be master of the boat. This case, therefore, on the merits, has one clear-cut question as to facts and one main question as to law.

Over and above the merits, a serious question of jurisdiction is raised. The decree of October 3, 1914, ordered a sale of Pettenger's one-sixth interest and released Sassaman's five-sixths interest. No exception was taken to this decree and no order in the nature of a stay or supersedeas was made in time. On the contrary, at the government's request the decree was executed. By this action an appeal was waived and custody of the *rem* was lost.

ARGUMENT.

As to the facts, Sassaman was either up to his neck in this smuggling trip, and should have been sent to prison, or he is entirely innocent. There is no halfway ground in the matter. If Sassaman is innocent, as we contend and as the lower court has found, the main question of law is also simple. Can an owner's boat be forfeited when it was stolen or taken out without his knowledge or consent? This point of law the court has also found with us. We think both of these questions are rightly settled in Sassaman's favor.

In examining what has been decided regarding the facts, the court will see that Pettenger testified in the government's behalf that Sassaman knew of his smuggling trip. This Sassaman at all times flatly denied and every circumstance supports his testimony. On the other hand, Pettenger's testimony is contradicted by all the circumstances and by his own statement made in a prior deposition, which apparently he forgot.

Counsel for the United States makes much of the preliminary agreement claimant's Exhibit "A," stating that the agreement was modified, but not abrogated,

and remained an agreement to operate upon a basis of equal profits. This apparently is his foundation for the claim that Sassaman and Pettenger were partners. This position is untenable. The young men started out to build a boat with equal shares and to operate it as partners. Pettenger failed to keep up his end. [Tr. p. 119.] The boat became involved in debt and Sassaman stepped into the breach by making settlement with creditors through his friend Singleton and to protect Singleton tied the boat up by the new written agreement dated December 23, 1913. [Tr. pp. 55-56, p. 116.] This agreement speaks for itself. By it Pettenger, amongst other things, agreed to make no contract; not to take the Calypso out without a permit from Sassaman; not to borrow money or give a personal note on the Calypso; not to employ a crew without a permit from Sassaman; and "under no circumstances shall the ship's papers be transferred to anyone except by Wm. L. Sassaman." No possible partnership could remain after the signing of this agreement.

Ownership and Control of Vessels.

If two persons agree to build a ship together to be paid for and owned by them in different proportions, they are tenants in common and not partners.

Merrill v. Bartlett, 23 Mass. 46;
Thorndike v. Trustees, 23 Mass. 120;
Mitchell v. Chambers, 43 Mich. 150, 38 Am. Rep. 167;
Cinnamond v. Greenlee, 10 Mo. 578;
Croasdale v. Boyneburk, 195 Pa. St. 377, 46 A. 6.

This rule is fully recognized by the United States:

"Part owners of ships are seldom partners in the commercial sense, because no one can become the partner of another without his consent, and because if they acquire title by purchase, they usually buy distinct shares at different times, and under different conveyances, and even when they are the builders they usually make separate contributions for the purpose. Generally speaking, they are only tenants in common; * * *.

"Even where the part owners of a ship are tenants in common, the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship's husband as managing owner. Smith, Merc. Law, 6th Ed., 197.

"Admiralty, however, in certain cases, if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. Such are the general rules touching the employment and control of ships; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master. Maude & P. Ship., 67, 72."

The Wm. Bagaley v. U. S., 5 Wall. 377, 18 L. Ed. 583, 589.

"The master of a ship is the person who is entrusted with the care and management of it. He

is the agent of the owner. * * * He is a special agent for navigating the vessel."

8 Ency., U. S. Supreme Court Rep., 302.

"The trust reposed in the master of a vessel obliges him to obey the written instructions of his owners."

Petopsco Ins. Co. v. Coulter, 3 Pet. 222, 232, 7 L. Ed. 659.

The method of appointing or removing a master is left entirely to contract. It is a question of power in the appointment or authority of agent, and revocation or termination may be by any appropriate method, with this exception: When there are co-owners, the majority in interest appoint and remove the master.

The United States has no concern as to the method adopted or who is master except as to restrictions on citizenship.

In "The Boston," decided 1832, Fed. Cas. No. 1669, the method of appointing a master was discussed, and the questions decided remain the rule today.

The case explains that the law does not interfere in the mode of appointment of a master, further than as regards his national character, then says:

"He (the master) is, *pro hac vice,* the agent of the owner; and any mode of authorization competent to give power to one man to act for and bind another, is sufficient to constitute him master of a ship.

"The registry act of the United States requires that the name of the master shall be inserted in the register of the vessel (1 Stat. 291); that on a

change of ownership, a new register shall be taken out (*Id.* 294); and that, when the master is changed, the register shall be produced to the collector, and a report be made to him, by the owner, or the new master, of such change, whereupon the collector shall endorse a memorandum of the change on the register, and subscribe his name thereto. (*Id.* 295.) None of these provisions, however, whether complied with or not, affect the validity of the master's authority. They are only designed to secure the revenue against the allowance to foreign vessels, of privileges which only vessels belonging to citizens of the United States are entitled to enjoy."

The Boston, 3 Fed. Cas. (No. 1669) p. 921.

"The master of a vessel is appointed by her owners and is their agent."

The Donaldson, 167 U. S. 599, 42 L. Ed. 292, 295.

"Any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner."

U. S. Rev. Stat., Sec. 4250.

Clayton v. The Emory, 4 Fed. 342, construing U. S. Rev. Stat., Sec. 4250, holds emphatically:

"That the majority (in interest) of the owners of a vessel have the power to remove the master whether he be part owner or not, and to resume possession of her at their own pleasure;" and "that nothing but a written agreement, entitling a part

owner to possession, shall be available against the right of the majority." (P. 345.)

The absolute right of the owners of a vessel to remove the master with or without cause, unless they have yielded that right by contract, is incontestable.

Lombard etc. v. Anderson, 67 C. C. A. 432 (4th Circuit 1914), 134 Fed. 568;
Montgomery v. Henry, 1 Dall. 50, 1 L. Ed. 32, 1 Am. Dec. 223;
Fed. Cas. No. 9, 737;
Ward v. Ruckman, 36 N. Y. 26.

The fact that a master is part owner adds nothing to his authority as master. He is simply agent of the owners as a body.

Childs v. Gladding, Fed. Cas. No. 2678.

"Who is the real owner?" and "Who is authorized master?" are questions that may always be inquired into. Registration with the collector of customs is not conclusive upon either of these points and may even not be *prima facie* evidence. The Supreme Court of California says:

> "On the trial the court admitted as evidence over the objection of the plaintiffs, a copy of the register of the vessel 'Golden Gate,' for the purpose of showing that the plaintiffs were part owners in the said vessel. The entry in the customhouse books of the registry or transfer of a vessel is not even *prima facie* evidence as against one not claiming to be an owner, unless such entry be shown to have been made by authority of the person named in it. In Fraser v. Hopkins, 2 Taunt.

5, Lord Mansfield said, in reference to the contention that the entry was evidence against such person: 'To suppose the effect of the act to be such as is contended for would be to impute madness to the legislature.' And Hunter, J., said: 'Any bystander may put down a name in the register. You must connect the defendant with it.' And Lawrence, J., adds: 'Unless you show who is to be charged, the register cannot be made evidence even *prima facie*.'"

Moynihan v. Drobaz, 124 Cal. 213, 71 Am. St. Rep. 46.

Davidson v. Baldwin, 24 C. C. A. 453, 79 Fed. 95 (6th Circuit 1897), decided by Judges Taft, Lurton and Sage, holds that a mortgagee enrolled as owner on the ship's papers may prove that he is only mortgagee and deny liability as owner; also that a person enrolled as master may in fact not be master. The court says:

"In the case before us, it turns out that, though Reid stood on the enrollment as master, he was not acting as master when these repairs were ordered. James Murdock was actually the master controlling the navigation of the Sea Gull, and was appointed to that place by Reid. That Murdock was acting as master was known to appellants. That his name had not been inserted in the license does not affect his actual status as master, for the registry and enrollment statutes are only for the protection of the revenue, and failure to have his name inserted as master would not affect Murdock's actual authority as master. The Boston, 1

Blatchf. & H. 309, Fed. Cas. No. 1669; Steamboat Co. v. Scudder, 2 Black 385."

Davidson v. Baldwin, 24 C. C. A. 458, 79 Fed. 95.

In The Freeman v. Buckingham, 15 L. Ed. 342, the United States Supreme Court held that false bills of lading issued by the regular registered master without the knowledge of the owner of the vessel, cannot operate to create a lien under the maritime law binding the owner's interest in the vessel. The general owner is not estopped to show the fraudulent character of said bills of lading even in the hands of a *bona fide* holder. The court say:

> "There can be no implication that the general owner consented that false pretenses of contracts having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him, or his vessel, and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit."

The Freeman v. Buckingham, 15 L. Ed. 342.

From the foregoing authorities, it is clear that, without special agreement to the contrary, the owners of a boat having the majority interest control its policy, appoint and remove the master. If they do not act, there is no master. A person is master only when appointed in such way as empowers and creates him an agent.

That a person may be master without being enrolled on the ship's papers or registered on the custom-books, and not master while so enrolled or registered, is also true. The whole question is one of authority and good faith. Each case must stand on its own merits.

The contention of appellee herein is that Pettenger was never appointed master of the Calypso and never had authority to act as such. Not only that, but if he ever had been master, or ostensible master, such authority was absolutely terminated by the agreement signed by Sassaman and Pettenger dated December 23, 1913, depriving Pettenger of all right to take the Calypso out. While under this disability, Pettenger secretly took the Calypso on his smuggling trip, his object private gain. Under this state of facts, we argue there can be no forfeiture against Sassaman and the other interveners.

We are exactly within the doctrine of a case construing this very section of the Chinese Exclusion Act, decided by the U. S. District Court, of the Northern Division of the State of Washington, July, 1890, entitled U. S. v. The Wilton, 43 Fed. 606. We quote the case in full:

> "Chinese Restriction Act—Forfeiture—Master of Vessel.
>
> "A vessel stolen from its owner, and used while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of the law, does not for that cause become liable to seizure and forfeiture. To work a forfeiture of a vessel under the Chinese Restriction Act, the master must knowingly violate

the statute. A person in control of a stolen vessel is not master of the vessel in the sense in which the term is applied to an officer in the statutes of the United States.

(Syllabus by the court.)

"In admiralty.

"This is a case of seizure of a vessel captured while engaged in bringing Chinese laborers into the United States contrary to law, and a forfeiture is claimed on the ground that the person who had actual possession and command of the vessel was guilty of knowingly violating the statutes of the United States which prohibit such immigration.

"P H. Winston, U. S. Atty., and P. C. Sullivan, Asst. U. S. Atty., for libelant.

"C. D. Emery for claimant.

"Hanford, J. (orally): The evidence clearly establishes that Mr. Bertram is the owner of the vessel; that the six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him, who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him. And on this state of facts the question is whether the vessel is to be forfeited to the United States. The statute that has been cited to me contains no provision whatever for the forfeiture of a vessel. However, there is a statute found on page 504 of this same volume (25 St. U. S.) which prohibits absolutely the bringing of Chinese laborers into the United States, and provides that the duties, liabilities, penalties and forfeitures imposed and the powers conferred by the second, tenth, eleventh and twelfth sections of the act to which this is a supplement are extended to and made applicable to this act. This refers back to sections 2, 10, 11

and 12 of what is known as the "Chinese Restriction Act of 1882." That act, as amended in 1884, contains a provision for the forfeiture of a vessel as follows:

" 'Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be liable to seizure and condemnation in any district of the United States in which said vessel may enter, or in which she may be found.' 23 St. U. S. 117.

"It is under this provision of the statute, if at all, that the vessel is to be declared forfeited. Now this forfeiture takes place only when the master of the vessel knowingly violates the law by bringing Chinese into the United States, and landing or attempting to land them; but in this case the only persons whom it is claimed were guilty of any attempt to violate the law are persons who were trespassers and wrong-doers against the owner of the vessel. They were not put in charge of the vessel by him in the capacity of master. The vessel had no master. It cannot be claimed that a thief in possession of a vessel is the master of it. He may be in full physical, manual possession and control of it, and have power over it, until the law gets hold of him and deprives him of that power, but he is not the master of the vessel in the sense in which that title is applied to an officer of a vessel in the statutes of the United States. This case does not come within the letter or spirit of any law of the United States under which a forfeiture can be claimed, and I think, as counsel has contended here, that if Congress had made a law that would apply to this case it would be unconstitutional as depriving a person of his property without compensation, and in a case in

> which no punishment or penalty could be rightfully inflicted upon him, he having violated no law. The decree will be in favor of the claimants. Counsel may prepare findings and a decree. The court will find the allegations of the libel to be true as far as they allege the bringing and attempting to land in the United States of Chinese persons, and all the affirmative allegations of the answer to be true."
>
> United States v. The Geo. E. Wilton, 43 Federal Reporter, page 606.

The agreement which precluded Pettenger from taking the Calypso on any trip, whether as master or otherwise, is set out on pages 55-56, 116 and 229 of the transcript.

PETTENGER WAS NOT MASTER WITHIN THE MEANING OF THE CHINESE EXCLUSION ACT.

Sassaman put in the Calypso $5000.00 and Pettenger about $1000.00, and the enrollment of May 22, 1913, shows them owners in that proportion. [Tr. pp. 119, 131.] About $3400.00 of Singleton's money and $800.00 of Los Angeles Creamery Company's money also went in the boat. [Tr. pp. 127, 32, 37.]

Pettenger was supposed by Sassaman to be engineer. [Tr. pp. 109, 123, 142, 145 and 151.]

The Calypso had three masters regularly appointed by Sassaman on the following dates:

July 2, 1913, Oren H. Dickason. [Tr. pp. 132, 151.]

July 15, 1913, Ralph L. Lopez. [Tr. pp. 132, 151.]

September 13, 1913, James H. Castle. [Tr. pp. 132, 146, 152.]

Castle was captain only two or three days and then went to Great Falls, Montana. [Tr. p. 110.] He was paid only by the trip. [Tr. p. 133.]

The boat was built at San Pedro (Port Los Angeles) for the Avalon (Catalina Island) trade and stopped work October 1, 1913, at the close of the season. [Tr. p. 133.]

During October or November the boat made a few trips to the battleship Pittsburg, gunboat Yorktown and to the old Chinese junk "Ning Po." [Tr. pp. 75, 96, 109.]

One Sunday Sassaman found Fred Fox (one of the participants in the smuggling trip) on the boat with Pettenger and exerted his (Sassaman's) authority by ordering Fox off the boat. [Tr. pp. 95, 96, 109, 135, 152.] This incident is very important, because Fox testifies of Pettenger telling him (Fox) he had gotten Sassaman's consent to let Fox go on the boat, when Pettenger's own testimony will show the contrary.

Fox testifies [Tr. pp. 95, 96] that when running out to the Chinese junk carrying passengers—about a month before the smuggling trip (which began January 3, 1913):

"Mr. Sassburg (Sassaman) here came down and asked me who I was hired by, and I says I was hired by his partner, Mr. Pettenger * * * and Mr. Sassburg he paid me off and took charge of the boat. Well, in two or three days, I don't remember how long—I was working in Warner's Machine Shop on a little boat belonging to my brother, and Pettenger came over from Long Beach and came to me and wanted me to go out with a moving picture outfit. I told

Pettenger I don't think Sassburg will like it, and I didn't want to have anything to do with Sassburg, and he says Sassburg has turned the boat over to me; he says, Sassburg has nothing to do with the running of the boat" [Tr p. 96.]

Pettenger secretly procured his name to be entered as master on the ship's papers November 24, 1913 [Tr. pp. 120 and 121], and then shows the name to Fox as proving that he, Pettenger, had full authority to run the boat. [Tr. p. 110.] The deposition and letter of Deputy Collector of Customs Stoecklin bear this out. [Tr. pp. 53, 148.] Claimant's Exhibit "B" is as follows:

"Custom Office.
"San Pedro, Cal., March 30, 1914.

"Hon. Judge Dooling and U. S. Commissioner Krull,
United States Dist. Court, San Francisco, Cal.

"Dear Sirs: This office wishes to advise the court in the case of the 'Calypso' that Morris Pettenger appeared in this office on November 24, 1913, and represented that he was managing owner of the 'Calypso,' and secured a transfer of the ship's papers from Wm. L. Sassaman to himself. Wm. L. Sassaman was not present and he did not give consent or have any knowledge of this transfer, said Wm. L. Sassaman is managing owner and master of the Calypso,' and Morris Pettenger secured this transfer by misrepresentation.

"A. J. STOECKLIN,
"Deputy Collector."

Fox testifies that he was not present when Pettenger signed up to become master, but that Pettenger showed him "the papers that he had signed on as master of the boat," and that he said he had arranged with this

gentleman here (Sassaman) to handle and manage the boat. [Tr. p. 111.] This was before Pettenger and Fox had gone on a certain moving picture trip [Tr. p. 111] and therefore before the agreement of December 23, 1913. But Pettenger testifies in answer to the question:

"Is it not a fact that after Singleton (Sassaman) fired Fox off the boat that he never consented to his running on the boat again? A. Yes, sir, that is true." [Tr. p. 165.]

Here we must digress a little to explain Sassaman's situation. Sassaman was then, and had been for many years, a hardworking employee of the Los Angeles Creamery Company. His hours of labor were from a little after midnight to 8 or 9 o'clock in the morning, driving a milk wagon and collecting. [Tr. pp. 66, 128.] There being only this night and early morning work (one milk delivery) Sassaman could and did frequently get down to San Pedro harbor and take the boat out. It was his pride; his life's earnings were in her. His best friends and employers were his creditors. Sassaman had no time for smuggling trips. The boat was heavily indebted and Sassaman was trying to protect his former employer, Singleton, who had come to his assistance with the finances. [Tr. pp. 117, 121, 122, 127, 139.]

While Sassaman is thus engaged and the boat is supposed to be tied up in port with instructions not to move her [Tr. p. 135], what is Pettenger doing? The very day Pettenger was secretly enrolled as master (November 24, 1913), Sassaman was writing the First

National Bank of Redlands to get a letter from it regarding the financial responsibility of Singleton which could be used in dealing with the Calypso's creditors. [Tr. pp. 69, 70.] Next, Sassaman arranges a meeting with the creditors for December 23, 1913, but Pettenger does not attend. Why? Pettenger is off on an attempted smuggling trip to San Diego. [Tr. pp. 112, 113, 114, 122.]

Pettenger testifies [Tr. pp. 57, 58]:

"Q. At the time said amendment was signed, December 26, 1913, was Wm. L. Sassaman with you? A. Yes, sir.

Q. Did he sign the same? A. Yes, sir.

Q. After signing the same and before said Calypso was seized did you see Mr. Sassaman? A. No.

Cross-examination by Mr. Archbald:

"Q. Why was this amendment referred to signed on the 26th rather than the date of its making? A. Because I was in San Diego.

Q. Were you with the boat in San Diego? A. Yes.

Q. Was Mr. Sassaman on the boat with you? A. No, sir."

That Sassaman was not attending to the smuggling trip is evident from Inspector Blee's testimony. [Tr. p. 90.]

Sassaman testifies [Tr. p. 72]:

"Q. State whether or not you ever consented before Mr. Stoecklin, or with any United States custom officer, as to the transfer of the ship's papers of the boat 'Calypso,' so as to make Morris Pettenger master in

place of James K. Castle? A I never consented. Mr. Stoecklin testified that I did not.

Q. Did you ever consent or agree with Morris Pettenger, or any person, that said Morris Pettenger might be master of said boat 'Calypso'? A. No, sir. He could not be master either, because he was no seafaring man. Mr. Pettenger had never been to sea before he went on the Calypso, and knows nothing about the sea—nothing about navigation.

Q. After Morris Pettenger signed that amendment to articles dated December 23, 1913, up to the time the Calypso was seized by the United States, did you see the Calypso? A. No, I didn't see her until April 1st, when I got to San Francisco.

Q. Did you know she was gone on any trip? A. Yes, I knew she was gone.

Q. How did you know? A. I went to Long Beach and found she wasn't in the harbor. I made four trips down there every day for four days.

Q. Did you know why she was gone? A. No, sir. * * *

Q. Had you been told that she would go? A. No, sir.

Q. Did you consent that she should go? A. No, sir.

Q. State fully and frankly whether or not after signing the amendment to the articles with Morris Pettenger, December 26, 1913, you consented or connived in any manner to said boat leaving Long Beach harbor where she was tied. A. I did not. I didn't know she was gone until I went down there and found out I didn't know until Captain Connel told me that she left on January 3, 1914.

Q. Did you, prior to the signing of said amendment to articles, December 26, 1913, consent or agree or

connive at said boat being at any time used for illegal purposes? A. No, sir." [Tr. pp. 73, 74.]

"Q. And what, if anything, was the boat used for after November? A. Nothing.

Q. What was done with it? A. It was tied up in the inner harbor at Long Beach.

Q. When was the first knowledge you had of the enrollment and license dated November 24, 1913, substituting Morris Pettenger as master in place of James K. Castle? A. I think it was March 7th. I went to the custom house in Los Angeles and Mr. Mahar told me." [Tr. pp. 75, 76.]

A. J. Stoecklin, deputy U. S. collector of customs, testifies Sassaman was not present when Pettenger made the entry on the ship's papers. [Tr. p. 53.]

Sassaman thought Castle was enrolled as master, and that he, Sassaman, as majority owner, could appoint a new master at any time. [Tr. pp. 120, 121, 123, 127, 132, 134, 138, 143, 146, 147.]

Sassaman was so in earnest about protecting his boat and his creditors, that he drew up the supplementary agreement between him and Pettenger dated December 23, 1913 [Tr. p. 116], the day of the creditors' meeting. This was signed by Pettenger three days later after Pettenger returned from the trip to San Diego. This is a crudely drawn document, but it shows that Pettenger tied himself up and was legally prevented from taking the vessel out without Sassaman's consent. The agreement was executed in perfect good faith by Sassaman, whether or not it was so executed by Pettenger and by it Sassaman believed he had tied the boat up so Pettenger could not take her out. Pettenger

was never given authority to deviate from this situation. [Tr. pp. 117, 118, 122, 123, 124, 126.]

It is inconceivable that Sassaman, working nights, Sundays and holidays, making the difficult trip to the mountains Christmas eve, 1913, to procure the money to pay the pressing claim of the Hatfield Machinery Company [Tr. pp. 181, 182], just as victory was assured became a party to the illegal importation of Chinese, without the word "Chinese" having ever been used in conversation between him and his associates and without his ever having made any inquiry or learned any particulars of what the trip was to be or to what extent he or his property was to profit by it. In other words, Pettenger having just made a trip to San Diego and having never turned in any money for any trip to Sassaman, and having signed an agreement which prohibited his taking the boat out, considers that with a few ambiguous words he sets aside all this situation and gets authority to take the boat on voyages that will absolutely imperil its ownership. Not one word of arrangement as to what Sassaman's profit in the matter will be or as to paying the boat's debts is intimated. All that Pettenger claims to have said presupposes a complete prior understanding between him and Sassaman, while in fact he testified that there had never been at any time a conversation on the subject before or after that disputed "barnyard" talk. Pettenger's attitude regarding the boat was not such as to cause him to take the risks he did, except for personal gain. His companion, Fox, who testified before Pettenger showed up as a witness, tells the true story. Thirty-four hun-

dred dollars was to be divided equally among the smugglers. Sassaman was not mentioned in it.

"Q. Who was on board the vessel at the time you were arrested? A. Myself, Dave Mayne, Morris Pettenger. * * *

Q. Did Pettenger or your brother or anybody make a report to the officers of the United States? A. I think not. Not to my knowledge.

Q. You knew these were Chinese who had no right to come into the United States? A. I did.

Q. Did you talk it over with Pettenger? A. Yes, sir.

Q. And with Fox? A. Yes, sir.

Q. And you all knew you were trying to get Chinese into here in violation of the law? A. Yes, sir.

Q. You expected to be paid for it? A. I did.

Q. How much did you expect to get out of it? A. We expected to have $3400.00 out of the trip. * * *

Q. How were you to divide the money? A. We were to divide it equally outside of Dave Mayne. He was paid a salary. * * *

Q. How much were you to get for the opium? A. $3400 for the lay-out.

Q. Who agreed on the $3400? A. I think Pettenger and Fox agreed on the $3400." [Tr. pp. 105-109.]

Pettenger testifies:

"Q. When you signed this amendment to this agreement on December 26, 1913, dated December 23, why did you sign it if you were intending to go off on a trip? A. I did not intend to at that time.

Q. When did this intention first come up? A. The proposition had been sprung on me, but I had not consented to go or anything of the kind.

Q. So you signed this before you consented to go?

A Yes, sir. Before I ever said anything to Sassaman about it." [Tr. p. 167.]

Yet Pettenger had already been to San Diego to get Chinese. Pettenger then testifies:

"Q. Then when did you make the arrangements as you say for taking this boat on this trip? A. That very same day. * * *

Q. At the time of signing this? A. No, sir. It was afterwards.

Q. How long afterwards? A. Oh, possibly an hour or so.

Q. Where? A. It was in the barnyard. * * *

Q. You did not mention any Chinamen did you? A. I don't believe I did.

Q. You testified awhile ago that you did not. Didn't you merely tell him it was a chance proposition? A. I believe that is about what I told him, it was a chance proposition.

Q. And you did not explain the details? A. No, sir.

Q. You are quite sure you did not explain the details? A. I am quite sure I did not.

Q. Did you tell him the Foxes were going? A. I don't believe I did.

Q. Did you tell him that Mayne was going? A. No, sir.

Q. Did you tell him about Lee? A. No, sir." [Tr. pp. 168, 169.]

Here was Pettenger signing up an agreement not tc take the boat out, not even intending to take it out, according to his testimony [Tr. p. 167], and yet the fact was that he had already made one trip to San Diego to get the Chinese. He did not know of the testimony of Fox. He had forgotten his testimony at

Los Angeles. He could not foresee the questions that would be asked him on cross-examination.

Fox testifies [Tr. p. 112] that Pettenger "took the boat and went down to San Diego, I do not remember how long he stayed, about a week, with a fellow named Garibaldi, and they went after a load at that time but did not get it, and Pettenger brought the boat back." [Tr. p. 112.] They did not "make connections." [Tr. p. 113.]

Pettenger himself testifies [Tr. p. 177] that he was down at San Diego when the creditors' meeting was held.

"Q. You had gone down and made a preliminary trip to this Chinese trip, had you not? A. Yes, sir.

Q. Don't you know that while you were down there at San Diego on that trip he (Sassaman) knew nothing about it? A. That is true.

Q. He did not know a thing about it? A. That is true. I had taken the boat out on a number of occasions that he knew nothing about." [Tr. p. 177.]

If one wishes to give any credence to the evidence of Pettenger with reference to informing Sassaman of this illegal trip, it is impossible to do so without going the full extent of making Sassaman all along an associate in the deal. The contradictions in Pettenger's story compared with the straightforward story of Sassaman are insurmountable.

Fox shows that Pettenger had every motive to make him think satisfactory arrangement had been made with Sassaman. It is to be remembered that Pettenger procured his enrollment without consulting Sassaman. As a co-owner he should have consulted him. His

right to make the enrollment depended entirely on authority from Sassaman. Next, after making the enrollment, the best way of bringing it to Sassaman's attention would have been to have shown the enrollment itself. It is clear, however, that Pettenger's motive was secretly to get where he supposed he could hire whom he pleased and do what he pleased with the boat. He was already planning smuggling trips. He was already telling Fox that everything had been fixed up and that Sassaman would not again interfere with his employment; that he had seen Sassaman and everything was arranged. Why should an acknowledged master have to run the boat secretly? The day before Fox and Pettenger took the oil on, January 2, 1914, Pettenger was gone all day. He told Fox he went to Los Angeles and saw his partner there. [Tr. p. 115.] This is Fox's testimony. Now Pettenger's own testimony is that he had already spoken to Sassaman about the deal at the Creamery Company's barnyard on December 26, 1913, and that at no other time or place, or before or after, had he spoken to Sassaman about the deal. Here Pettenger was either gratuitously and unnecessarily lying to Fox, or at the time of the conversation had not arranged for the trip at all. Other circumstances show that Sassaman knew nothing of Pettenger's enrollment as master. If he knew of it, why did he as late as March 7th, 1914, go to the customs collector, Mahar, at Los Angeles, to inquire if there was an enrollment of Pettenger as master and then actually take a trip to San Pedro to find out from Stoecklin about the enrollment? These might be self-

serving acts, had they not all taken place before Pettenger testified before the commissioner and before Sassaman had any intimation that the government's position would be that he knew of the enrollment.

Counsel for the government (brief p. 17, also on p. 19) wants to know why Pettenger was not asked in his deposition when taken by Sassaman as to whether he had sought Sassaman's consent to the trip. The answer is simple. Pettenger's deposition was taken April 9, 1914. [Tr. p. 59.] Not until April 27, 1914, when Pettenger's testimony was taken before the commissioner [Tr. p. 149] did Sassaman have the least idea that anyone supposed he had anything to do with this illegal trip. A guilty party would never have put himself in the hands of the government by pressing his claim in court. In our exceptions to the report of the commissioner, we asked for the privilege of putting in additional evidence, and supported this request by affidavits. [Tr. pp. 210-226.] The district judge rightly considered the evidence sufficient without additional testimony.

If Pettenger ever got the consent of Wm. L. Sassaman for this smuggling trip it was on December 26, 1913, in a conversation in the barnyard of the Los Angeles Creamery Company, an hour or two after the signing at Attorney Bradner's office of the agreement dated December 23, 1913. Sassaman testifies he never saw Pettenger after leaving Bradner's office until after the Calypso was seized. Pettenger testified the same way, but evidently forgot it. Sassaman, two hours after signing an agreement to tie up the boat and

protect its creditors, did not go into a smuggling project without inquiry, without knowing the parties or money involved, and with full confidence in the judgment and ability of Pettenger, whose authority up to that moment he was trying to limit. From being cautious, prudent putting things in writing and tying the boat up so as to eliminate Pettenger, Sassaman is supposed to have instantly put the whole boat in Pettenger's hands, and for an illegal purpose.

What happened in so short a time to change Sassaman in this way? What changed him from honesty to dishonesty; from lack of confidence in Pettenger to full confidence; and all without a motive, all without any agreement as to what profit or benefit Sassaman might get, or as to what precautions were to be taken?

Sassaman's attitude has never varied. At the close of the cross-examination by the U. S. attorney he comes out as plainly as in the beginning:

"Q. In that barnyard you heard Mr. Pettenger tell you, he came to you and he said, 'I have a proposition to go to Mexico to make some money,' and he says in his statement, 'Will you put up your boat against my liberty,' and he says you agreed to that? A. I swear in this court that I made no such statement, and that Morris did not make it to me; that he did not see me in the barnyard on the 26th day of December.

Q. Anywhere else did he say those things to you? A. I was only five minutes in the law office.

Q. Did he make that statement? A. He did not.

Q. You emphatically deny any such statement? A. All the statements he made." [Tr. p. 195.]

Fox's story corroborates Sassaman:

"He told me there was a Chinese that he had already connected with or could connect with. I acted as captain on the boat at times, and at times I acted as engineer; in small boats of that kind we take a turn wherever we happen to be needed. He spoke to me about this man, and wanted to get a load right away, and told me the details, and wanted me to go with him. He told me there was a Chinese that he had already connected with or could connect with, or could get a load if he went away and he wanted me to go with him. I told him I don't know nothing about it, I says, if you can see where it looks reasonable to get it through I will take a chance with you and see what we can do. Anyhow, we talked the thing over two or three times. The next thing I know my brother approached me about it and we all three talked the matter over, so then the next thing he told me was he was going to get some gasoline; the day he was going to get the gasoline I was fixing up the engine on my brother's boat; the result was, I think it was that day, he told me he could not get the oil, and he would have to see the Chinese again.

Mr. Preston: Q. That is, Pettenger would? A. Yes, sir, so then he said he was going to lay over another day and go and see Sassaman, his partner, and explain to him *thoroughly* what he was going to do; the trip he was going to make and so on.

Q. About what date was that? A. I could not tell you. I suppose it was three days possibly before we left.

Q. Before you made the trip to Mexico? A. Yes, sir, before we made the trip to Mexico." * * * [Tr. pp. 97, 98.]

"Mr. Hettman: Q. We would like to know what was said by Pettenger in the matter of the running of this ship; that is, the particular point. We would like to know what Pettenger said to you in regard to his plans as to the management of the ship? A. The day—I was going to say, when he came again he says, well, I have got everything fixed, he says, I have seen him and he is *thoroughly* satisfied and will *let us take a chance* with the boat." * * * [Tr. p. 98.]

On cross-examination Fox testified:

"The day before we took oil Pettenger was gone all day some place. Where he was I don't know. He told me he went to Los Angeles and saw his partner there. I don't know where he was. I was not with him.

Q. You did not see him go either way? A. I don't know where he went. I know he was gone." [Tr. p. 115.]

(From the evidence of Blee [Tr. pp. 82, 88, 89] and Fox [Tr. p. 100] it is clear that the oil was taken aboard January 2, 1914, the day before the smuggling trip. According to Fox, Pettenger told him that he had been to see Sassaman the day before sailing. Pettenger says he had not seen Pettenger since December 26th.)

The portions of the evidence we have quoted are necessarily cut up and give an imperfect idea of the whole situation. The testimony of both Pettenger and Sassaman, taken before the commissioner April 27, 1914, should be read as a whole. Read as a whole, it will be seen that Sassaman was either in on this smuggling trip from the very beginning, and that the agreement dated December 23, 1913, is an unscrupulous

ruse, or said Sassaman was acting in the highest good faith, up to the moment of the purported barnyard conversation with Pettenger. Then, either Sassaman's whole characteristics and purposes instantly change, or he did not understand Pettenger, or Pettenger did not have the conversation he claims at all. The latter is unquestionably the fact. The contradictions in Pettenger's position and testimony are too many.

Forfeiture Statutes.

Counsel for the United States (brief p. 23) states that he is in accord with the construction given the word "command" in the case of United States v. The Wilton, 43 Fed. 606, but attempts to dismiss this case by saying that the boat in the Wilton case was actually stolen. The Wilton case rests on the simple proposition that if the boat was in the possession of a person who had possession without the knowledge or consent of the owner, forfeiting the boat by the government would be "unconstitutional as depriving a person of his property without compensation, and is a case in which no punishment or penalty could be rightly inflicted upon him, he having violated no law." To keep Sassaman's boat would not only be taking property without compensation, but it would be defining as a crime that which has no element of a crime in it, either express or implied. It may be that this case is not a criminal proceeding to the extent of being without an appeal (The Ben R., 134 Fed 784, cited by the government), but it is certain that every statute which confiscates the property of a citizen for any act or omission to

that extent defines a crime or misdemeanor and to that extent becomes penal.

We are of course aware that plenary power is vested in the government to protect its revenues and regulate its commerce. Nevertheless, we know of no instance where a forfeiture is enforced against an innocent party unless that party is acting through an agent or has negligently or otherwise permitted his property to be used in a hazardous venture. We contend, therefore, that there is nothing in the claim of the U. S. attorney that the relation between Sassaman and Pettenger was such that it forfeits Sassaman's interest. As Judge Hanford says in said Wilton case: "The six Chinese laborers who were brought into the United States were so brought by a person unauthorized by him (the owner), who at the time had the possession of the vessel without his knowledge or consent, having in fact stolen it from him." The emphasis is on the fact of no authority, and of possession without knowledge or consent. In this Calypso case there is and could be no authority for Pettenger to take the boat out. When he did take the boat out it was without Sassaman's knowledge or consent. It was a wholly unauthorized act.

By the contract dated December 23, 1913, Pettenger agreed:

a. "To make no contracts."
b. "or take the Calypso out on any trip"
c. "to borrow no money or give any personal note"
d. "Not employ a crew"
e. "under no circumstances shall the ship's papers be transferred to anyone except by Wm. L. Sassaman."

What could be broader in their scope than these provisions? A person honestly bound by them could not be master within the meaning of section 10 of the Chinese Exclusion Act, or at all. He would have no authority; there could be no agency whatever. An owner, tying up a boat by such a contract, would never be responsible for the fact that it was in possession of the violator of the law.

Appellee certainly does not admit any authorized use of the boat by Pettenger in the harbor for making limited trips, as suggested by counsel for the government on page 24 of his brief. The trips referred to apparently were taken long before the agreement of December 23, 1913. Said agreement was for the express purpose of putting an end to them, along with all others. There is nothing in the "motor boat" statute quoted that bears on this case.

Forfeiture Cases Analyzed.

There is nothing in The Frolic, 148 Fed. 918, and 148 Fed. 921, cited by the U. S. attorney (brief p. 23), which is decisive of our case. Nor do we think it even militates against appellee's position. White, the owner, while retaining title, gave Colby, the purchaser, possession and use of the yacht Frolic under an agreement of sale, and Colby then appointed Junkins master, who caused the boat to forfeit by violating section 10 of the Chinese Exclusion Act. Here was an authorized master and the boat had to forfeit. This is in line with other forfeiture cases. Any person lawfully in possession of a ship or vehicle of transportation can

cause the same to forfeit by violating a provision of the statutes regulating trade or navigation. This case of "The Frolic" was decided solely on the ground that Junkins was lawful master.

We do not deny that there is a harsh rule enforced in this Frolic case.

> "White * * * agrees to allow said Colby to use the schooner yacht Frolic and to sell said Frolic to said Colby upon the terms and conditions" set forth in said contract.
>
> "Colby will put said schooner yacht Frolic in commission * * * to use said Frolic as a party boat during the term of this contract."
>
> "Said Colby also agrees to have personal charge of said yacht Frolic, and to keep her at all times in a condition satisfactory to said White, and shall not let said Frolic to rough or disorderly parties."
>
> "In case said Colby shall fail to perform any part of his agreement as herein set forth, said White can then take immediate possession of said yacht Frolic, and said Colby shall immediately return her to such place as said White may designate, and shall put her out of commission."
>
> The Frolic, 148 Fed. 918, 919.

While the rule which enforces a forfeiture in the above case is a harsh rule, it simply follows a harsh statute. The court found that Colby had authority to appoint Junkins master and that Junkins was master. Had the court found that Colby had no authority to appoint Junkins master, then the case should have been decided differently. The "Wilton" case. quoted in full by us, considers this question of authority and on that

ground decides that a thief or unauthorized person cannot cause a boat to forfeit as against an innocent owner. The Wilton case seems to be decided on principle, without citations, as many cases should be decided, although this rule of *no authority* is recognized in other cases.

In U. S. v. Two Barrels of Whiskey, 96 Fed. 483, the court quotes with approval The Lady Essex, 39 Fed. 767, saying:

> "It is clear that, if the goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner."

In U. S. v. 220 Patented Machines, 99 Fed. 561, referring to said Two Barrels of Whiskey case, the court says:

> "In the last case the forfeiture was refused upon the ground that the owner of the offending property was not responsible for the fact that it was in possession of the violator of the law."

We quote the whole decision in the Frolic case, after the statement of facts:

> "Brown, district judge: Upon the foregoing facts I am of the opinion that, while the title to the vessel did not pass to Colby and remained in White, Colby had such possession and control of the vessel as to authorize him to appoint E. A. Junkins as master. As it is agreed that said Junkins knowingly and in violation of the statutes landed certain Chinese persons at the port of

> Providence, the schooner Frolic is subject to condemnation."
>
> The Frolic, 148 Fed. 918, 920.

In the case at bar it is impossible that without authority "to make contracts," or "take the Calypso out on any trip," or "borrow money," or "employ a crew," Pettenger could be master or have such "possession or control" of the vessel as to enable him to forfeit it. Pettenger had no authority, no possession, no control. The case of the Frolic is for, rather than against us.

The second Frolic case, 148 Fed. 921, is to the effect that "the innocent owners forfeited with the guilty." No principle not already discussed is involved in this second Frolic case. The facts are evidently the same as in the first case (treated above), except that the question is as to whether or not a chronometer on the vessel forfeited. There could be no question about its forfeiture under the general rule that property lent, leased or permitted to be used for a hazardous venture incurs all the risks of that venture. The chronometer was forfeited, the court holding that the word "vessel" in section 10 of the Chinese Exclusion Act includes its appurtenances and that the chronometer was leased to the owners and became a part of the vessel's appurtenances. In our Calypso case there is no lease of the vessel or its appurtenances and no permissive use of any kind. The court says:

> "The claim alleges merely that they are the owners of the chronometer. This is not enough to avoid a forfeiture; for the question of title becomes immaterial, if they have in fact consented

to its use as an appurtenance of the vessel. Such consent sufficiently appears, and makes the chronometer part of the vessel for the purposes of forfeiture."

The Frolic, 148 Fed. 923-924.

Dobbins Distillery v. U. S., 96 U. S. 395, 24 L. ed., 637, cited by counsel for the government, page 23 of his brief, was a case where title to land leased for a distillery was forfeited by reason of the illegal acts of the tenant. The court say:

"The unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owners themselves. Power to that effect the law vests in him *by virtue of his lease,* and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner." (Italics ours.)

Dobbins Distillery v. United States, 96 U. S. 395, 24 L. ed., 637.

In U. S. v. Two Barrels of Whiskey, 96 Fed. 479 (C. C. A. 1899), the court construed R. S. 3450, a harsher statute than section 10 of the Chinese Exclusion Act, yet so construed it as to exempt from forfeiture the rights of an innocent mortgagee, entitled to possession. By so much the more will the rule apply in construing section 10 in this case to exempt all the claimants.

R. S. 3450 provides that "every vessel, boat, cart carriage or other conveyance * * * used in the

removal (of the unstamped whiskey) shall be forfeited." There are no ameliorating words of any kind in this portion of the statute. There is nothing said about knowledge or innocence. The court say:

> "Harvey Latham (the mortgagee) had no interest in this whiskey, had no knowledge of its removal, and had not assented to the use of the horse, mule and wagon for that purpose, and no indictment has been laid against him. * * * It is admitted that Harvey Latham is innocent of any intention to violate the revenue law, and that his property was in the possession of Oliver Deaton without his knowledge or consent, and the question is whether the mere accident of its situation can give it a criminal character independent of its owner's fault, and thus subject it to the extreme penalty of forfeiture."
>
> *Idem* 96 Fed. 479-480.

After calling attention to the fact that it is undoubtedly competent for lawmakers to declare certain acts criminal irrespective of the motive, the court say:

> "The object of section 3450 is to punish all persons who, *with intent to defraud the government of the tax* (italics ours), remove or conceal goods upon which the tax has not been paid, and, in addition to the punishment of such persons, it provides that all conveyances and animals used in the accomplishment of this unlawful purpose shall be forfeited. Undoubtedly, there is a presumption against any one whose property is found employed in this unlawful business that it is so engaged with his consent, but can it be that this presumption is irrebuttable? The contention of the government is that, this being a proceeding *in rem,*

it is the guilty thing that has offended, and that this is to be forfeited, irrespective of any participation of its owner. If this team and wagon had been stolen from the owner, it would be clearly unjust, unreasonable and preposterous to forfeit it because it was used by the wrongdoer in the transportation of illicit liquor. If this exception is admitted, it would follow that property has no guilty character, except as connected with persons who have charge of it, and the result is that it is the duty of the court to inquire into the facts; and, if it appears clearly that the owner has not hired or loaned it to another for an unlawful purpose, or knowingly permitted it to be in the possession of a party likely to engage in an unlawful business, or negligently suffered it to be controlled by a stranger, whose character gave no assurance that it would not be unlawfully employed, or is in some way justly chargeable with blame or negligence, he ought not to suffer the sweeping condemnation that justly falls upon those who consciously violate the law, and upon those whom is laid the duty of vigilance, and who negligently or otherwise fail in that duty."

U. S. v. Two Barrels of Whiskey, 96 Fed. 481.

The case then proceeds by citing U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, to the effect that where the business of a distiller is carried on without knowledge of the mortgagee that a still was to be set up on the mortgaged property, "so far as concerns the real estate, the judgment must be against the equity of redemption only;" also Boyd v. U. S. 116, U. S. 616, 6 Sup. Ct. 524, approving the saying: "Goods as goods cannot offend, forfeit, unlade, pay

duties, or the like, but men whose goods they are;" and Mitchell v. Torup, Parker 227, to the effect that "the owners of ships are to take care what master they employ and the master what marines."

The case then quotes Chief Justice Marshall in Peisch v. Ware, 4 Cranch 347, "that the removal for which the act punishes the owner with forfeiture of the goods must be made with his consent or connivance, or that of *some person employed or trusted by him;*" and Justice Thompson in 1 Paine 499, Fed. Cas. No. 12, 916: "I am not aware of a single instance where, by any positive provision in the revenue laws, a forfeiture is incurred that does not grow out of some *fraud, misconduct* or *negligence* of the party on whom the penalty is visited;" and what Judge Brown says in The Lady Essex, 39 Fed. 767:

> "The authorities are direct to the proposition that a forfeiture of goods for a violation of the revenue laws should not be imposed unless the owner of such goods, or his agent, has been guilty of an infraction of such laws. It is clear that, if the goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner."
>
> *Idem* 96 Fed. 483.

The court then cites two cases of forfeiture, U. S. v. Two Horses, Fed. Cas. No. 16, 578, and U. S. v. Two Bay Mules, 36 Fed. 84, and explains these cases, saying:

> "In the first case the owner was himself engaged in hauling the whiskey; in the latter he knowingly

permitted another to use his team, who perverted it to the unlawful purpose. While in neither case was there a conscious violation of the law, in both negligence might be fairly attributable, and the thing really punishable was their carelessness in putting their vehicles at the service of those likely to violate the law, and who actually did violate it."

Idem 96 Fed. 483.

In closing, the court says:

"The information is against Harvey Latham, who is alleged to be the owner, and, as we understand the law of North Carolina, he had the right of possession and the right of property; and it would be pressing the implication of negligence further than justice demands, and administering a harsh law too harshly, if, under all circumstances of the case, in the absence of any suspicion of fraud or connivance or proof of negligence, the innocent owner should be made to suffer from the wrong-doing of one who got possession of his property without his knowledge or consent. It is not to be assumed that the government desires to take the property of a citizen charged with no crime without some proof that he has knowingly or negligently contributed to its commission, and undoubtedly the secretary of the treasury, upon the facts of this case agreed upon, and as found by the trial court, would, in the exercise of his discretion, remit the forfeiture; but, if this man has rights, a court of justice is the place to maintain them, and he should not be compelled to ask them of executive officers as a favor. The judgment of the court below is affirmed."

U. S. v. Two Barrels of Whiskey, 96 Fed. 484.

The above is a case where the mortgagee had a right to possession. Here Sassaman has the right to possession and has stipulated for Singleton's benefit that the boat shall be tied up and not operated. Next, the object of R. S. section 3450 was to punish all persons who "with intent to defraud the government" removed the goods. The portion of the section which forfeits "all things used in the removal" says nothing about the intent to defraud applying to them, but the court makes it apply. In our case section 10 applies only to a vessel *whose master knowingly* violates its provisions, and by its terms could not apply to a vessel not in charge of an authorized master.

In our case the owner has not "hired or loaned" the Calypso to another, or "knowingly permitted it" in his possession, or "negligently suffered it to be controlled by a stranger," nor is he "chargeable with blame or negligence," nor "responsible for the fact that it was in the possession of the violator of the law."

"The owners of ships are to take care what masters they employ." Yes. But here no master was employed. On the contrary, the boat was tied up by agreement so that she could hire no crew, make no trips, enter into no contracts. All of this accrues to the protection of the owner and creditors. There was no person "employed or trusted" by appellee, no "fraud, negligence or misconduct" on his part. The vessel was "stolen" or "obtained possession of fraudulently or without authority." The owner did not "knowingly permit another to use" his vessel, "likely to violate the law, and who actually did violate it." An innocent owner

and innocent creditors should not "be made to suffer by the wrong-doing of one who got possession of their property without their knowledge or consent."

Counsel for the U. S. (brief p. 23) cites the case of U. S. v. One Black Horse, 129 Fed. 167-169, apparently as stating a rule different from U. S. v. Two Barrels Whiskey, *supra* (96 Fed. 479; 37 C. C. A. 518). The One Black Horse case declares a forfeiture in strict accordance with R. S. section 3062, but expressly states that the Whiskey case "deals with a statute different from the statutes in the case at bar," and seems to approve the case and esteem it highly. We have already shown that this Whiskey case deals with principles that concern our Calypso case throughout. The One Black Horse case, 129 Fed. 167, is a District Court case, while the Whiskey case is a Circuit Court of Appeal case and presumably of higher authority. However, the cases are not in conflict. The District Court case follows literally the statute. R. S. section 3062 gives no leeway in the matter. The vehicle must forfeit, if not a common carrier. There is no question of "intent to defraud" nor of possession by a validly appointed "master" The only question considered is: Was there smuggled merchandise "on or about any such vehicle?" This is a harsh statute and is enforced against an innocent livery-stable keeper who lets his vehicle to a person who illegally uses it. We are reminded of the remark of Judge Woodruff quoted in the Whiskey case, 96 Fed. 483: "It is expected that the owner of property will see to the uses made of it at his peril." The Calypso was not hired out or let to

anyone. She was not in the hands of a lessee or authorized master. In the One Black Horse case the court say:

> "Where the intention is left any way obscure, the courts have repeatedly said that the forfeiture of goods for violation of revenue laws would not be imposed, unless the owner of the goods or his agent has been guilty of an infraction of the law."
>
> U. S. v. One Black Horse, 129 Fed. 168.

Counsel for the U. S. (brief p. 23) cites U. S. v. Stowell, 133 U. S. 1, 33 L. ed. 555. That case exempts an innocent mortgagee's interest in land from forfeiture. It is a case having an *"in rem"* feature. Rev. Stat. 3281 as re-enacted by the Act of February 8, 1875, 18 Stat. 310, imposed a fine and imprisonment on the person, and a distinct forfeiture of property, so much so that the court considers carefully various questions as to the personal property alone. The situation is very instructive in our Calypso case. First of all, there is a statutory governmental policy in the case of distilleries which exempts innocent mortgagees, and the same policy may well be supposed to inhere in other penal statutes if the wording in any way permits. In the particular section being construed, Rev. Stat. 3281, the wording is that "all * * * personal property, found in the distillery or rectifying establishment, or in any building, room, yard or enclosure connected therewith, and used with or constituting a part of the premises * * * shall be forfeited to the United States." 18 U. S. Stat. 310. The court say:

"In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there; * * * The present case does not require us to go beyond this, or to consider whether the sweeping words, 'all personal property,' must be restricted by implication in any other respect. For instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner."

U. S. v. Stowell, 133 U. S. 1; 33 L. ed. 558.

Here, then, is a statute where *all personal property* found in any building, room, yard or enclosure, connected with the distillery and used with or constituting a part of the premises, is declared forfeited, yet the court seems willing, in the furtherance of justice, to limit that wording to mean property used in the distilling business or openly in connection therewith. Let us suppose that a janitor in the basement of a twenty-three story New York building sets up a still in connection with his boilers. Under the strict wording of this statute the personal property of any tenant in said building would forfeit, because no one can deny that the personal property is in a building and room connected with the illicit still and constituting a part of

the premises. Yet no court would construe the law in this manner. It would first say, and should say, that the statute did not contemplate these conditions; that there must be a direct or implied connection with the offense; that Congress had no power to pass a law forfeiting property having no connection with the illicit act; and that some doctrine of acquiescence or negligence must enter.

Likewise, in our Calypso case, it will not be presumed that the court intended that a thief or wholly unauthorized person, or one for whom an owner was in no way responsible, could cause the interest of an innocent owner of the vessel to forfeit. The court should hold that section 10 of the Chinese Exclusion Act uses the word "master" in the legally accepted sense of "agent" or "authorized person," well understanding the law that the enrollment with the customs department adds nothing to his authority and is not binding on the owner unless he participates therein; and, irrespective of this view of the use of the word "master," it will not be presumed that the legislature intended this statute to apply to vessels stolen from their owners, or taken out without authority or any right of possession. And in this connection, we wish to say that it comes with bad grace for the government to insist that Pettenger is master when his enrollment as such was by their negligence and failure to make inquiry as to the validity of his appointment or under a statute that does not provide for or require any such inquiry. It is admitted by all that Pettenger had no authority to act as master when he first caused

himself to be enrolled. The government should either recognize the fact that the enrollment was unauthorized and negligently permitted by it, or consistently take the position that the enrollment is not evidence in this case at all. It should not attempt to use an *ex-parte* act before its officers, of a guilty party, as a foundation for claiming a forfeiture against an innocent party.

Throughout this discussion, it must be borne in mind that the United States has no general authority to define and punish crimes and misdemeanors. Any punishment, penalty or forfeiture which can be enforced by the United States must be a punishment inflicted because of some act done by a guilty or negligent party which affects the collection of revenues, commerce or the carrying on of some department of government under powers expressly delegated by the Constitution to the United States. Therefore, a forfeiture which attempts to take anything which has no connection with such violation would be unconstitutional and incompetent for Congress to enact. There is impliedly written in all penal statutes of the United States the implication that they apply only to wrong-doers and their privies.

In the case of 208 Bags of Kainit, 37 Fed. 326, the court holds that when property is "unlawfully" taken from the possession of the owner and brought ashore in contravention of law, it will not be forfeited against the true owners. This is again the doctrine running through all the cases, that a stranger or unauthorized person cannot affect the rights of an innocent third

party unless said third party has done some act which connects him directly or through his agent with the illegal act. In our Calypso case, the boat was not in the hands of an authorized person, but unlawfully taken out for the smuggling trip. The Kainit case is very much in point.

In the lower court the government relied on the case of U. S. v. 220 Patented Machines, 99 Fed. 559.

There is nothing in this case inconsistent with U. S. v. Two Barrels of Whiskey, 96 Fed. 479, and our contention that the Calypso does not forfeit. Claimant leased certain cigar-making machines. The lessor knew they were to be used in the manufacture of tobacco and would be subject to forfeiture for violation of the statute. The statute imposing the forfeiture upon all machinery "used in the business" was in legal effect a part of the lease and the lessor has no standing to complain:

> "If the owner of such apparatus chooses to lease it to, or in any other way to put it into the hands of, a person engaged in the manufacture of cigars, he must be regarded as transferring the possession with the knowledge that the apparatus may be put to an unlawful use, and may, therefore, be liable to the penalty of forfeiture. He takes the risk, therefore, that the manufacturer will conduct the business in accordance with law; and, if the risk falls out against him, he cannot be heard to set up his own ignorance of the manufacturer's illegal conduct, or his own innocence of unlawful intent."
>
> U. S. v. 220 Patented Machines, 99 Fed. 561.

In the Calypso case, there was no leasing or consenting whatever to the use of the Calypso for this smuggling voyage or for any voyage. On the contrary, there was an agreement that the boat should not be used at all or taken out. Claimants have not placed the Calypso in a position where they cannot be heard to complain. They have every reason to complain and confidently expect protection from a court of the United States upon showing the true situation with reference to the Calypso. This case, upon which the government's counsel relies, cites and approves the U. S. v. Two Barrels of Whiskey case, 37 C. C. A. 518, 96 Fed. 479. Speaking of it the court say:

> "In the last case the forfeiture was refused upon the ground that the owner of the offending property was not responsible for the fact that it was in the possession of the violator of the law. Upon the facts there proved, the owner was as innocent as if his property had been stolen from him, and then put to the illegal use. Here there is the vital difference that the machines in controversy were deliberately put into the possession of the manufacturer, who was thus enabled to violate the law in the use of the property, and actually did put it to an unlawful use."
>
> U. S. v. 220 Patented Machines, 99 Fed. 561.

The cases treated in all respects sustain appellee:

First. Forfeiture statutes are to be reasonably construed.

Second. Where the wording is obscure or there are two or more possible constructions, the courts will construe the statute to protect innocent parties.

Third. The statute under construction has no clause of forfeiture except as a master shall knowingly violate the statute, and in the case at bar there was no master.

Fourth. The facts of this case bring us within well recognized exceptions, protecting innocent owners or lienors under as harsh or harsher statutes.

Fifth. It would not be competent for the government to take property for public use from any person without that person directly, indirectly or negligently having violated a law of the United States. It is incredible that the statute refers to a wholly unauthorized person.

Sixth. If the present case were to be decided on principle every consideration protects the innocent creditors and owner.

Boiled down, the question is: Does "master" in section 10 of the Chinese Exclusion Act mean a validly appointed agent? If it does—and it can mean nothing else under the authorities—the interest of Wm. L. Sassaman is protected unless he consented to the illegal trip.

APPELLANT ADOPTED AND EXECUTED THE JUDGMENT OF THE LOWER COURT, THEREBY WAIVING AN APPEAL. JURISDICTION WAS LOST BY SURRENDERING POSSESSION OF THE REM.

The question of jurisdiction is most serious on this appeal. We think at appellant's instance the judgment of the lower court was fully executed, custody of the *rem* lost, and that jurisdiction thereof has not been reacquired. The government by executing the judgment

waived its right to take an appeal and is estopped from questioning Sassaman's possession and ownership of the boat. The facts affecting this question are as follows:

1. The final decree was entered October 3, 1914, condemning and forfeiting to the government the undivided one-sixth interest of Pettenger in the Calypso and releasing the five-sixths interest of William L. Sassaman. [Tr. pp. 234-236.]

2. At the order and instance of the government this decree was executed by issuing a writ ordering sale by publication of notice and by a sale at public auction made by the United States marshal.

3. Sassaman purchased Pettenger's interest, paid the purchase price to the marshal, took his bill of sale therefor, took an order for possession of the whole vessel and took possession of the whole vessel October 13, 1914.

4. At said time and prior to any act of the government, or the court, with reference to an appeal, said Sassaman took actual and complete possession of said vessel and its equipment and receipted therefor, and ever since has been in the actual, open, notorious and exclusive possession of said Calypso.

5. Thereafter, without notice to said Sassaman, the United States attorney's office procured to be signed by the district judge and had served upon appellee Sassaman October 15, 1914, a purported temporary restraining order in words and figures as follows:

In the District Court of the United States, in and for the Northern District of California, First Division. In admiralty. No. 15,522.

United States of America v. The Gasoline Launch "Calypso," Her Boats, Tackle, etc.

TEMPORARY RESTRAINING ORDER.

Good cause appearing therefor, and upon motion of Walter E. Hettman, assistant United States attorney,

It is hereby ordered in the above-entitled cause that the gasoline launch "Calypso," an undivided one-sixth interest in which has been forfeited, condemned, and sold by a decree of the above entitled court, be held in its present custody and that the said boat be not removed from the present mooring pending the determination of a petition for an appeal from the decree in the above-entitled cause in the matter of the undivided five-sixths interest in said boat.

Dated October 14, 1914.

M. T. DOOLING,
United States District Judge.

RETURN ON SERVICE OF WRIT.

United States of America, Northern District of California—ss.

I hereby certify and return that I served the annexed temporary restraining order on W. L. Sassaman by handing to and leaving a true and correct copy thereof with said W. L. Sassaman personally at San Francisco in said district on the 15th day of October, A. D. 1914.

J. B. HOLOHAN,
U. S. Marshal.
By C. B. DELANEY,
Deputy.

(Endorsed): Filed Oct. 22, 1914. W. B. Mailing, clerk; by C. W. Calbreath, deputy clerk.

6. Thereafter Sassaman appeared specially before said district judge, praying the court to vacate said purported temporary restraining order as having been entered without jurisdiction, and as being an attempt to recall a judgment executed at the instance of the government and to recall possession of a *rem* sold and surrendered up to Sassaman at the instance of the government. At the close of said hearing the court entered a purported order modifying said temporary restraining order in words and figures as follows:

In the District Court of the United States, in and for the Northern District of California, First Division. In admiralty. No. 15,522.

The United States of America v. The Gasoline Launch "Calypso," Her Boats, Tackle, etc.

ORDER MODIFYING TEMPORARY RESTRAINING ORDER.

The verified petition of claimant, William L. Sassaman, having been filed herein praying this court to vacate its temporary restraining order signed and filed herein October 14, 1914, and said matter having been this day presented to the court and argued by Warren E. Lloyd, Esq., attorney for petitioner, and by John W. Preston, Esq., United States attorney,

It is ordered that said order filed herein October 14, 1914, requiring the gasoline launch "Calypso" to "be held in its present custody and that the said boat be not removed from the present mooring, pending the determination of a petition for an appeal from the decree in the above-entitled cause, in the matter of the undivided five-sixth interest in said boat" be, and the same is hereby vacated and set aside;

It is further ordered that pending the final determination of this cause in whatever court it may be prose-

cuted, possession of said five-sixth interest in said boat be and the same is hereby awarded to petitioner, William L. Sassaman.

It is further ordered that in consideration of the said revocation of said order, that said William L. Sassaman do not sell, encumber or otherwise dispose of the undivided five-sixths interest in said "Calypso" awarded to him as claimant herein, pending the determination of a petition for an appeal from the decree in the above entitled cause as to said undivided five-sixths interest to abide the outcome of said appeal and the execution of the judgment or decree herein and to deliver the same within the jurisdiction of this court or the Circuit Court of Appeals for such purpose should judgment of sale be finally ordered against said five-sixths interest and that, meanwhile, said William L. Sassaman, his agents and employees, be permitted to utilize said boat and operate the same, in or out of, and from any Pacific Coast points or ports of the United States, subject to no penalty hereunder as to wear and tear upon said vessel, her boats, tackle, apparel, furniture or appurtenances, or damage by the elements.

An exception is ordered reserved to petitioner and all claimants and interveners herein to this order, and to the jurisdiction of the court to make the same, except as to that portion hereof vacating the order filed herein October 14, 1914.

Dated October 15th, 1914.

M. T. Dooling,
United States District Judge.

(Endorsed): Filed Oct. 15th, 1914. W. B. Mailing, clerk; by Lyle S. Morris, deputy.

7. Thereafter, on October 26, 1914, appellant gave the notice of appeal herein. [Tr. pp. 241-242.]

The above facts are more fully set out in the papers on the motion to vacate temporary restraining order and to dismiss appeal for want of jurisdiction, filed herein May 20, 1915, and argued before this court orally May 24, 1915. The salient points, however, are that the decree was executed at the instance of the government and possession surrendered up to Sassaman all before any appeal had been taken. At the time of making said orders no notice of appeal had been given and no petition for appeal filed. There was no supersedeas or order in the nature of a stay. On the contrary, the decree of the court was not only in full force and effect but had been executed.

Our claim is that the court at that time had no jurisdiction whatever to restrain the utilization or operation of the whole of said boat nor to restrain its use at all. It is certain the court could not make a valid order affecting the one-sixth interest which had been sold.

There is another peculiarity about these orders. They purport to make Sassaman an unwilling custodian of the boat. He was before the court to object to the orders and yet is named as custodian by them. This in itself is enough to make the orders insufficient to accomplish any purpose. But the vice of the orders is that they are made without jurisdiction. They do not vacate or set aside the sale, if such action could have been had at that time. They do not modify the decree, if the decree could have been recalled or modified at that time. They do not modify the decree so as to reserve in it any rights of custody regarding the boat, if such reservation could have been made.

On the contrary, without recalling or modifying the decree, and after its execution, these orders attempt to put a restraint upon the use of property which is in the full possession and ownership of a party originally adversary to the government, against whom no appeal was pending and in whose favor a decree had been executed at the instance of the government.

The court could not and did not order a reseizure of the boat. The *rem* was lost, the jurisdiction of the court had vanished for two reasons. First: The government had executed the decree and waived its appeal. Second: The *rem* had been lost and jurisdiction could not revest without a reseizure.

The government is wholly estopped from claiming that Sassaman is not the owner of the boat, freed from all claims growing out of its original seizure. By ordering a public sale and giving unconditional title to the purchaser of Pettenger's interest, the government implies and warrants that it is executing a decree which will give all title it had in the *rem*. The decree is a whole pertaining to one *rem*. It is impossible to split up the matter. Pettenger's interest was sold without any strings upon it. It would be an idle act to sell the interest and then say that the government, by appealing as to Sassaman, tied up the whole boat and retained its custody. We are aware that the modified order of October 15, 1914, refers only to the five-sixths interest of Sassaman, but the original order of October 14, 1914, purports to detain the custody of the whole boat; and the modifying order grows out of and is based on this original order and

is equally without jurisdiction. Not having made any reservations in the decree, or in the sale of Pettenger's interest, or in the delivery of the boat to Sassaman under the decree releasing his interest, the government is clearly estopped from claiming that Sassaman is yet subject to its orders as to custody of the vessel or required to respond at all to a purported appeal.

Not only are the above considerations plain, equitable and founded on sound reasoning, but the nature of an admiralty appeal is such that the government cannot appeal at all without taking up the whole case. If this matter is before this court, it is as a whole with power in this court to enter as complete and full a judgment in the matter as could the lower court. But the government has not brought up the whole case. It has not appealed as against claimants Singleton and Los Angeles Creamery Company. It has put it out of its power to bring up the question of Pettenger's interest. It has really brought no matter before this court at all. Its own cited cases are against it and demonstrate the inconsistency and impossibility of its position.

In purchasing the interest of Pettenger at the government's sale, Sassaman had reason to believe, and did believe that he was entitled to immediate possession of said boat, and that he was acquiring the sole title, interest, claim and possession of the United States of America therein. He received from said government a bill of sale for the possession of said vessel free from any restraint or condition whatever. The judgment and decree ordering sale of said vessel

and the delivery of the possession of the same to Sassaman was a judgment entered against appellant and executed and performed at its instance and vested in Sassaman just what the decree and the bill of sale say. The government cannot by its subsequent *ex parte* acts nullify these first acts. Title and possession passed out of the government. It can neither recall title nor possession.

We quote exactly from appellant's brief (pp. 21-22) to show the necessity of this:

"In The Lucille, 19 Wall. 73, 22 L. Ed. 64, the court, speaking by Mr. Justice Miller, said:

> "'An appeal in admiralty has the effect to supersede and vacate the decree from which it it taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated—a new trial, in which the judgment of the court is regarded as though it had never been rendered. A new decree is to be made in the Circuit Court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should therefore be complete within itself.'

"In Irvine v. The Hesper, 122 U. S. 256, 266, 7 Sup. Ct. 1181, 30 L. Ed. 1178, Mr. Justice Blatchford, delivering the unanimous judgment of the court, said:

> "'The claimants not having appealed to the Circuit Court, it is suggested that they are liable

> for at least the amount awarded by the District Court, and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.' "

Nothing could be plainer than the above words. In showing the general nature of an admiralty appeal, counsel for the government has shown this particular appeal impossible. He cannot "supersede and vacate" the decree which he has already executed. He cannot have "a new trial, completely and entirely new, with other testimony and other pleadings," nor a new trial "in which the judgment of the court is regarded as though it had never been rendered." The decree here must be enforced by the order of the Circuit Court, "is not sent back to the District Court for executing the decree, or for any other proceedings whatever," yet before it comes here the lower court has executed the decree, certainly partially, and we think as a whole. We are aware that the government has given notice that it appeals from only "that portion of the final

decree * * * which decrees that the undivided five-sixths interest of William L. Sassaman in said vessel be not condemned and forfeited to the government." [Tr. p. 242.] This does not help, because no one can appeal from a decree he has ordered executed. If, for sake of argument, it be admitted the decree was only executed partially, the appeal still will not lie, owing to this court considering the matter *de novo* and as a whole. An appeal in admiralty "vacates altogether the decree of the District Court."

The case of the Steamer Lucille, 19 Wall. 73, 22 L. Ed. 64, above quoted, fully demonstrates this. The Circuit Court merely affirmed the decree of the District Court with costs. The Supreme Court held this was not a final decree, in effect not being a decree at all, because what the costs were was a matter of record in the lower court, leaving the judgment of the Circuit Court incomplete. In the case here there is no pretense but that a vital portion of the judgment has been executed in the lower court and has not even been attempted to be brought up to this court. The result is that no decree can be entered here that will not leave untouched and unaffected by this court the portion of the decree executed in the lower court.

In Yeaton v. U. S., 5 Cranch. 281, 3 L. Ed. 101, the Supreme Court decided that the admiralty appeal was so completely under the control of the Circuit Court that no judgment was deemed entered at all by the lower court, so that if the statute declaring a forfeiture or penalty should be repealed pending an ap-

peal, it would relieve all parties from the effect of a judgment by the lower court, no matter how correct such judgment might have been in the first instance.

This court is in full accord with the above cases in holding that an appeal in admiralty by either party from the District Court to the Circuit Court of Appeals vacates altogether the decree of the District Court and opens the whole case for trial anew in the Appellate Court. *In re* the San Rafael, decided October 16, 1905, by this court, it is said:

> " 'It is well settled,' said the Supreme Court in Irvine v. The Hesper, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175, 'that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. Yeaton v. United States, 5 Cranch. 281, 3 L. Ed. 101; Anonymous, 1 Gall. 22, Fed. Cas. No. 444; The Roarer, 1 Blatchf. 1, Fed. Cas. No. 11,876; The Saratoga v. 438 Bales of Cotton, 1 Woods 75, Fed. Cas. No. 12,356; The Lucille, 19 Wall. 73, 22 L. Ed. 64; The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.' The same rule applies here, since this court now has the jurisdiction of appeals in admiralty from the District

> Court that formerly appertained to the Circuit Court. The Sirius, 54 Fed. 188, 194, 4 C. C. A. 273. The whole of the cases in hand, therefore, were opened by the appeals taken by the petitioner and claimants. It is unimportant that no appeal was taken by McCue, or by the guardian of the widow and children of Alexander Hall, and we must make such disposition of the cases as the records before us show to be proper."
>
> The San Rafael, 141 Fed. 275.

Not having a reply by further brief herein, we may anticipate that counsel for the government will call attention to admiralty rule 3 of this court which provides that the appellant may at his option state in his notice of appeal that he desires only to review one or more questions involved in the case, but that "he shall be concluded in this behalf by such notice." Also that section 3 of rule 4 provides that where the appellant shall appeal specially, the apostles may by stipulation between the proctors contain only such papers, etc., necessary to review the questions raised by the appeal. We reply that all these provisions are limitations on the appellant, merely authorizing him to limit the effect of his appeal as to himself and to shorten the record if opposing counsel will stipulate. They do not show that the appeal does not take up the matter as a whole. In no event could they excuse an appellant who executed the decree in the lower court and then attempts to appeal. Moreover, admiralty rules 1, 7, 8, 9 and 10 of this court can bear no other construction than that the case is tried *de novo* in this court, that the decree of the lower court is

wholly vacated, making the situation entirely inconsistent with taking the case up only in part.

The right to take this appeal has been lost by the government voluntarily surrendering the *rem*.

> "It follows, from this consideration, that before judicial cognizance can attach upon a forfeiture in *rem*, under the statute, there must be a seizure; for until seizure it is impossible to ascertain what is the competent forum. And, if so, it must be a good subsisting seizure at the time when the libel or information is filed and allowed. If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned before judicial proceedings are instituted. It is not meant to assert that a tortious ouster of possession, or fraudulent rescue, or relinquishment after seizure, will divest the jurisdiction. The case put (and it is precisely the present case) is a voluntary abandonment and release of the property seized, the legal effect of which must as we think, be to purge away all the prior rights acquired by the seizure."
>
> Judge Story in The Brig Ann, 9 Cranch. 289, 291, 3 L. Ed. 734.

"Messrs. Humphrey, Meade & Gardner certainly did make a seizure, by their open pos-

session of the vessel, and bringing her under the guns of Fort St. Phillip. But there is this objection, both of Mr. Roberts (assuming that he made one) and of the other persons, that it was never followed up in any subsequent prosecution or proceedings. Procedure of Messrs. Humphrey, Meade & Gardner seems to have been voluntarily abandoned by them; and even that of Mr. Roberts, if he made one, does not seem to have been persisted in. Now, a seizure, or capture—call it which we may—if once abandoned, without the influence of superior force, loses all its validity and becomes a complete nullity. Like the common case of a capture at sea, and a voluntary abandonment, it leaves the property open to the next occupant."

The Josefa Segunda, 10 Wheat. 312, 22 L. Ed. 329.

"Actions in *rem,* strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character—its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case."

Judge Field in Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372.

In Taylor v. Sawyer, 11 L. Ed. 132, opinion by Judge Tawney, the U. S. District Court of Alabama gave decree against an executor for about $5000 before any appeal was taken. The state court with jurisdiction removed the executor and appointed an administrator c. t. a. An appeal was then taken against the prior executor. It was held that no valid appeal was pending in the Supreme Court.

In Hovey v. McDonald, 27 L. Ed. 888, 892, it is held that a decree ordering payment of money by a receiver or dissolving an injunction is not stayed by a supersedeas unless provided for in the decree. A receiver cannot be held liable who obeys the decree.

In this Calypso case the execution of the decree is at least equivalent to the dissolving of an injunction, no stay being provided for in the decree.

The Facts Found by the Lower Court Should Not Be Disturbed.

Irrespective of the fact that an appeal to this court is a trial *de novo,* it is certain that this court adheres firmly to the rule that it will not disturb the findings of fact by the lower court unless there is a clear abuse of discretion.

> "While this court is not limited to the review of questions of law, only, in admiralty appeals, it is nevertheless the settled practice to give great weight to the findings of fact by the trial judge, and not to disturb such findings, in cases of conflicting testimony, unless they are found to be clearly against the weight of the evidence. The

Alijandro, 56 Fed. 621, 6 C. C. A. 54; The Brandywine, 87 Fed. 652, 31 C. C. A. 187."

The Oscar B., 121 Fed. 978, 981.

We are well aware that this rule is based upon the reasoning that the district judge saw and heard the witnesses and is better qualified than the Appellate Court to judge of their truth or falsity. It is also based upon the consideration that a difficult and conflicting matter once settled, even upon a record of written evidence, should not lightly be disturbed. The Circuit Court of Appeals, First Circuit, in "Steam Dredge No. 1" say:

> "We have carefully examined the record, and while there are unquestionably serious doubts on all the mere questions of fact—whether the libellant, and also whether those in charge of the barge, were each guilty of negligence—yet, under the circumstances stated, we cannot determine that any conclusion we might reach, different from those reached by the District Court, would be more satisfactory to ourselves, or better supported by the record. * * * However all these things may have been, we cannot, as we have already said, satisfy ourselves that, if we should reverse the conclusions of the District Court on these mere questions of fact, we should reach any new conclusions which could be better supported than those of that court."
>
> Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 297.

From the foregoing it appears that the presumptions are all in favor of the record and decision of the

lower court, and in all cases the decisions of a trial court on questions of fact are entitled to great respect and will not be reversed unless manifestly contrary to a preponderance of the evidence.

Counsel for the government has been more than diligent in behalf of the authority he represents. Throughout these long proceedings we have been oppressed by the fact that many of the rules he invokes are governed by considerations of public policy which put upon a defendant a heavy burden, relieved somewhat in this case, however, by the uniform courtesy of the United States attorney's office. The brief we have had to answer is terse and forceful, but we must insist that the government in convicting Pettenger as a manifest violator of the law and in forfeiting his interest in the Calypso has done its full duty. The government should now leave undisturbed the decree of the lower court under which a sale of this forfeited interest was made and under which the *rem* has been restored to William L. Sassaman uncondemned.

Respectfully submitted,

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